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IN THE

Supreme Court of the United States,

[redacted]

No. 5 Orig.
O. T. 1907

THE UNITED STATES OF AMERICA, *Complainants*,

vs.

JOHN F. SHIPP AND OTHERS, *Defendants*.

BRIEF FOR J. F. SHIPP, SHERIFF, AND HIS DEPUTIES, DEFENDANTS, ON PRELIMINARY QUESTIONS.

JUDSON HARMON,
For J. F. Shipp, Sheriff, et al.

CLIFT & COOKE,
ROBERT PRITCHARD,
Of Counsel.

THE BARCLAY PRINTING CO., Strobridge Building, 108-118 W. Canal St., Cincinnati, O.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 12, ORIGINAL.

THE UNITED STATES OF AMERICA, *Complainants*,

vs.

JOHN F. SHIPP AND OTHERS, *Defendants*.

BRIEF FOR J. F. SHIPP, SHERIFF, AND HIS DEPUTIES, DEFENDANTS, ON PRELIMINARY QUESTIONS.

STATEMENT.

The charge in the information is this:

One Ed Johnson, having been convicted and sentenced by a court of Tennessee, whose jurisdiction over the accused and the offense is not questioned, petitioned the United States Circuit Court for that State for a writ of habeas corpus on the ground, among others, that "he had been denied a trial by a fair and impartial jury, and had been denied the aid of counsel in violation of the fifth and sixth amendments to the Federal Constitution, and that said petitioner was also denied rights secured to him under the fourteenth amendment to the Federal Constitution." (Inf. p. 2.)

At the hearing upon the petition, answer and oral testi-

mony, the petition was dismissed. Thereupon, before the day fixed in the sentence for the infliction of the penalty, Johnson secured from one of the Justices of this Court and also from the Court the allowance of an appeal from said judgment of the Circuit Court. The order allowing the appeal provided that "the custody of said appellant be retained pending this appeal." (Inf. 2-4.)

Defendant Shipp, the sheriff in charge of said Johnson, and his deputies, being advised of the allowance of said appeal and said order and having reason to believe that an attempt would be made by a mob to take said Johnson and put him to death, caused the customary guard to be withdrawn from the jail where said Johnson was confined, in order to make less difficult and dangerous the execution of such design, and also conspired and confederated with the other defendants unlawfully to take and lynch said Johnson, which was done.

All this was "for the purpose of preventing this honorable court from hearing the appeal of the said Ed Johnson, allowed by this court, as aforesaid, and for the purpose of preventing the said Ed Johnson from exercising and enjoying a right secured to him by the Constitution and laws of the United States," "and in order to show their contempt and disregard for the said order of this honorable court." (Inf. 7, 8, 10.)

The first paragraph of the answer of said Shipp, sheriff, and his deputies to the rule to show cause why they should not be punished for contempt is, in substance, that neither on the averments of the petition of said Johnson for a writ of habeas corpus nor on the proof taken on the hearing was his case one of which said Circuit Court of the United States had jurisdiction, nor one which was appealable to this court; but on the contrary it clearly appeared on the pleadings and proof that said Johnson was not "in custody in violation of

the Constitution or of a law or treaty of the United States" (R. S. Sec. 53), so that the writ of habeas corpus did not extend to him, being in jail (id.); and that, as it likewise clearly appeared that the case was not one "that involves the construction or application of the Constitution of the United States" (Act of March 3, 1891, Sec. 5, 1 Supp., p. 903), there was no right of appeal to this court; and that consequently this court did not acquire jurisdiction of said case and should not proceed to inflict punishment as for contempt for the acts charged, but should leave them to be dealt with as crimes.

The case is now set for hearing on the information and said plea. The averments of each are taken as true for present purposes as to matters of fact well pleaded, the court to take notice of the record in Johnson vs. Tennessee, on which the appeal was allowed.

ARGUMENT.

While the appellate jurisdiction of this Court is derived from the Constitution, it is "with such exceptions and under such regulations as Congress shall make." (Art. III., Sec. 2.)

National Exchange Bank vs. Peters, 144 U. S. 570.
Cross vs. United States, 145 U. S. 571.
In re Glaser, 198 U. S. 171.

It will be admitted that the right of appeal here must be found, if at all, in the fifth clause of section 5 of the Circuit Court of Appeals Act, supra, "in any case that involves the construction or application of the Constitution of the United States."

In re Lennon, 150 U. S. 393, 398.

In M. C. & L. R. Co. vs. Swan, 111 U. S. 379, the Court, by Mr. Justice Matthews, said:

"But the rule, springing from the nature and limits of

the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Quoted in Kentucky vs. Powers, 201 U. S. at p. 35, see also id. p. 24.

We may surely assume that this Court will the more willingly inquire into its jurisdiction in a case when it is asked to inflict personal punishment for disregard of its own order only.

We assume that it will hardly be contended that the mere allowance of an appeal is sufficient to give the court jurisdiction of a case which from its nature is not appealable. Such action is *pro forma* only, and as it is necessarily had in every case the jurisdiction of the court would always be established by an *ex parte* order.

If the principle involved here were that of immunity of judges from liability for acts done judicially, as, for instance, if by the order of the Justice who allowed the appeal or that of the Court itself Johnson had been taken into Federal custody, as he might have been under paragraph 2 of Rule 34, the making of the order would be judicial action, jurisdiction or not, because, as the court said by Mr. Justice Field in Bradley vs. Fisher, 13 Wall. 335, 352:

"No personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held

by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind (i. e., when there is not jurisdiction), and for the same reasons."

See also Austin vs. Vrooman, 128 N. Y. 229, by Judge now Mr. Justice Peckham, and Grove vs. Van Dyne, 44 N. J. L. 654.

So it might be, too, with the marshal or other officer of this court if he had confined Johnson by virtue of such an order, notwithstanding lack of actual jurisdiction to make it. Horton vs. Hendershot, 1 Hill, 119.

But as was held in the case last named:

"The rule which justifies the officer, when acting under such process as I have mentioned, is one of protection and not of assault. It is a shield, but not a sword. The officer when sued may defend under such process, but he can not build up a title upon it which will enable him to maintain actions against third persons."

The same rule applies, of course, to the court or judge.

This proceeding is of a purely criminal character, both in form and in fact, and not of a civil or remedial character whose purpose is to secure or enforce the rights of a party.

Bessette vs. W. B. Conkey Co. 194 U. S. 324-328.

It is proposed to make the order allowing the appeal and the alleged acts of the defendants in preventing the court from hearing the case on appeal the basis of affirmative penal

action against them, so that the question is fundamental whether the case in which the order was made was one which in fact came within the limited appellate jurisdiction of the Court, whether Johnson really had the right, of which the defendants are charged with depriving him, to have this court hear his case; because, if an order be made without jurisdiction, there can be no punishment for contempt.

Ex parte Rowland, 104 U. S. 604-612.
Ex parte Fisk, 113 U. S. 713.
In re Sawyer, 124 U. S. 200.

It has sometimes been suggested that a person to whom an order is directed will not be heard to question the authority of the court to make it, when he is arraigned for disobedience, as in the McKenzie Contempt Cases, 106 Fed. 788, 109 Fed. 971. This point seems to have been negatived by inference in In re McKenzie, 180 U. S. 536, the Court holding that the orders were not necessarily void, and refusing, for that reason only, to review the action of the Circuit Court of Appeals. But this suggestion has always been by way of admonition only, because we know of no case where it was made in which it was ever the basis of punishment for contempt, the finding having always been that the order disobeyed was in fact authorized. And in such cases generally, if not always, the proceeding has had for its object the suppression of a continuing disobedience and not mere punishment for past acts.

Nor is this proceeding one for the purpose of protecting or vindicating the dignity of the Court generally, as in cases of disturbance in its presence or hearing, reflection on its motives, etc., where no question of jurisdiction in a particular case can arise.

Neither is it one for the exercise of disciplinary power over

officers of the court, because these defendants are officials of the State of Tennessee, not of the United States.

In short, when a proceeding is strictly and solely punitive, like this, and the penalty may include imprisonment, we submit that this court, whose standards of personal liberty are so high, should not be controlled by any general theories of discipline or dignity, but only by the result of the inquiry whether the order, disobedience to which is the basis of the proceeding, was made in a case to which its jurisdiction, as limited by law, extended. It surely is sufficient to maintain the authority of the court to impose on all persons the risk of such decision, without denying the right to ask that it be made. And the power to decide whether the case be one of which the court has jurisdiction can not properly be held to be the equivalent of actual jurisdiction for purposes purely penal, especially when the jurisdiction of the court is limited and not general.

The only question, therefore, is whether Johnson's proceeding in habeas corpus in the Circuit Court did or did not in fact constitute a "case that involves the construction or application of the Constitution of the United States." If it did, this Court had appellate jurisdiction of it and should proceed to inquire whether its order has been disobeyed. It it did not, this Court had no jurisdiction of it and should now so hold for the purposes of this proceeding, just as it would have done if the State of Tennessee had raised the question on the attempted appeal. That State invokes the judgment of the court on it now by its officers whom it is proposed to punish by imprisonment or otherwise, thereby affecting their ability to discharge their official duties.

The Court has many times pointed out the tests by which it will determine whether or not a case involves the construction or application of the Constitution of the United States.

In Rogers vs. Peck, 199 U. S. 425, the court said by Mr. Justice Day, p. 433:

"The extent of the right of Federal courts to interfere by a writ of habeas corpus with proceedings of courts and other authorities of a State is carefully defined by statute."

And at p. 434:

"The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted."

The case must involve the construction or application of the Constitution "within the intent and meaning of this statute," In re Lennon, 150 U. S. 393, 399, supra, which, as the case shows, means that there must be a bona fide Constitutional question which must have controlled the judgment. See also,

Carey vs. Houston & Texas Central Ry. 150 U. S. 170, 181.

In the latter case the court said by Mr. Chief Justice Fuller, p. 181:

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors, and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case *in the sense of the statute.*"

Also, Carter vs. Roberts, 177 U. S. 496.

C. H. & D. Ry. vs. Thiebaud, 177 U. S. 615, 620.

In Whitten vs. Tomlinson, 160 U. S. 231, 240, 242, 247, it was held that facts alleged in a petition for habeas corpus can be taken as true only when not denied by the return, nor controlled by other evidence; and the allegations there were held to be mere conclusions of law and not matters of fact. The court said:

"There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule, established by the decisions of this court, above cited, that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus, in advance of any proceedings in the courts of the State to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several States, and with the performance by this court of its appropriate duties."

Also Kohl vs. Lehlback, 160 U. S. 293, where it was held, too, that an objection to a juror can not be used in a proceeding on habeas corpus to raise a Constitutional question, it not having been brought to the attention of the State court, pp. 302, 303.

The two cases last cited, and also Reid vs. Jones, 187 U. S. 153, show that the exceptional cases in which resort may be had to habeas corpus in the Federal courts, instead of to the highest court of the State, are only those of public and not mere private emergency, where the operations of the government are affected, as by the imprisonment of an officer.

In Minnesota vs. Brundage, 180 U. S. 499, 505, it was also held that the Constitutional question must have been raised in the State court before it can be made the basis of a proceeding in habeas corpus in the Federal court.

Also New York vs. Eno, 155 U. S. 89, 96-7.

The Constitutional question must be real and substantial.

In Storti vs. Massachusetts, 183 U. S. 138, the court said by Mr. Justice Brewer, pp. 143-4:

"The petition presented no case entitling the petitioner to a discharge, as the grounds stated therein are absolutely frivolous" and "the grounds set forth in this petition for the discharge by the Federal Court of the petitioner from the custody of the warden are wholly without foundation."

In Bradley vs. Lightcap, No. 3, 195 U. S. 25, the court said by Mr. Chief Justice Fuller:

"A case does not necessarily arise under the Constitution or laws of the United States every time a writ of error would lie to the judgment of the State court," p. 26.

The above cases were on appeal under the Circuit Court of Appeals Act, but they simply apply the principle which is well established in all cases where the appellate jurisdiction of the Court is invoked.

In Wilson vs. North Carolina, 169 U. S. 586, the court said by Mr. Justice Peckham:

"A consideration of the facts convinces us that the motion to dismiss this writ of error for lack of jurisdiction ought to be granted," citing (p. 595) Hamblin vs. Western Land Co. 147 U. S. 531, where it was held that a "real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts;" and New Orleans vs. New Orleans Water Works Co. 142 U. S. 79, 87, where it was held that "the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." And p. 596: "We are of opinion that the facts herein present no such case, and that the jurisdiction of this court does not extend to the case as made in the record now before us."

Also Bonin vs. Gulf Co. 198 U. S. 115, 117.
Lampasas vs. Bell, 180 U. S. 276, 282-3.

The Federal question can not be first raised in the assignment of errors, but there must have been a definite claim of a right under the Constitution or laws of the United States.

Muse[illegible]lington Hotel Co. 168 U. S. 430
Ans[illegible]ited States, 159 U. S. 695, 7.
Chica[illegible]. W. Ry. vs. Chicago, 164 U. S. 454.

It is true that the jurisdiction of the Court in error to the State court of last resort depends on R. S. section 709, which in terms requires the Federal right to be specially set up or claimed. But the above cases and many others show that the failure of the record to disclose a case of the kind which this court is authorized by law to review is held to amount to a *lack of jurisdiction*, not mere ground for affirmance. See Arkansas vs. Schlierholz, 179 U. S. 598; Chicago & N. W. Ry. supra, 457-8; Hulbert vs. Chicago, 202 U. S. 275, 281; Davis vs. Texas, 139 U. S. 651, 657; Mortin vs. Texas, 200 U. S. 316.

The Court has decided too often to require citation of cases that proceedings in habeas corpus can not be used to review the action of State courts. And the above cases show that when the appellate jurisdiction of this Court is invoked by appeal from the action of circuit courts in such proceedings, the Court applies the same strictness of scrutiny in determining whether they really and substantially involve the application or construction of the Constitution, as it does in cases where it reviews on error the final judgments of the State courts. A case can not be said to involve a Federal question when no such question was raised, nor any facts shown from which it could be raised, in the course of the State proceedings with which it is sought to interfere by habeas corpus.

Now, as averred in the plea and shown by the record, no

question of the application or construction of the Constitution was raised or suggested at the trial in the State court, nor was there proof or tender of proof which could be the foundation for such question. Mortin vs. Texas, supra. The petition for habeas corpus alleged no lack of jurisdiction in the State court either to try Johnson or to adjudge the sentence under which he was in custody. It is not charged that any of the alleged denials of rights secured to him by the Constitution of the United States were made by virtue or under color of the Constitution, laws, or rules of practice of the State. While an alleged denial of Constitutional rights by State officials acting contrary to the laws of the State may be subjected to review in this court, this can not be done through a writ of habeas corpus, but only by writ of error to the highest court of the State.

In re Wood, 140 U. S. 278.

The same rule was applied in Kentucky vs. Powers, supra. While that case related to habeas corpus issued under the removal act, R. S. section 641-2, it applies equally here because the principle is the same.

As the court said by Mr. Justice McKenna in Howard vs. Kentucky, 200 U. S. 164, 173, "It was not designed, as was observed by the Chief Justice in In re Converse, supra, 'to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State.'"

The various decisions which speak of the discretion of the Federal courts whether they will interfere or not with State proceedings directly by habeas corpus or require the party first to exhaust his remedies in the state courts must manifestly be taken to refer to cases which do in fact involve constitutional rights and therefore come within Federal jurisdic-

tion and not to cases of which, from their lack of such nature, the Federal courts can not take cognizance at all.

The claims of Johnson that he was deprived of Constitutional rights were not real and substantial, but were "absolutely frivolous" and "wholly without foundation."

Storti vs. Massachusetts, *supra.*

In his petition for appeal filed in this court he charges first that he "was denied his right of a public trial." But the proof at the hearing in the Circuit Court, all of which is set forth in the transcript which accompanied the petition for appeal, showed without dispute that at the request of his own counsel precautions were merely taken to prevent the attendance of disorderly persons; that such precautions were withdrawn when the first day of the trial showed them to be needless, and that during each and all of the three days the trial lasted there was a large attendance of the public. In his petition to the Circuit Court he charged that his father and mother and all other friends were shut out. There is not a particle of proof to this effect; but the evidence shows it was a mere pretense.

In his petition for appeal he charged, second, that he was denied a trial by a fair and impartial jury, and "was denied the aid of counsel, all in violation of the fifth and sixth amendments to the Constitution." The record discloses on the contrary, without dispute, that he never made or had ground for any objection to the selection or character of the jury. On the contrary it appears that his counsel, learning from the officers of the court that colored men had not been discriminated against in the selection of the jury, forebore to make any objection, and the evidence showed that names of negroes were in the jury box and that negroes had served on juries at various times. In his petition to the Circuit Court he set out the emotional exclamation of a

juror which the proof shows was after the evidence had closed and the young woman upon whom the rape had been committed had been recalled at the request of a juror, but no exception or request was made in consequence of the incident because it was treated by all, including the prisoner and his counsel, as merely the effect of the proof on an emotional nature, and not as evidence that the juror was prejudiced when accepted and sworn. As stated in the answer the juror was quieted by the other jurors and apologized to the Court. The record further shows that as he was unable to employ counsel, the State court appointed three lawyers of high standing to conduct his defense, and that they did so, as he himself admits in his petition to the Circuit Court, with ability, fidelity and zeal. It is well settled, too, that the first ten amendments to the Constitution apply only to Federal and not to State proceedings.

Spies vs. Illinois, 123 U. S. 131, 166.
In re Sawyer, 124 U. S. 200, 219.
Davis vs. Texas, 139 U. S. 651, 61-3.

In the petition for appeal he charges, third, that he "was also denied rights secured him under the fourteenth amendment to the Constitution, in this, that he was denied by the State court the right of change of venue, and the right after his conviction of making a motion for a new trial and appealing his case to the State Supreme Court, which is provided for by the laws of the State." The record shows, on the contrary, that he never applied for a change of venue at all; that he presented no motion for a new trial until the three days allowed by the long settled rules of the court had expired, and that he was not denied the right of appeal to the State Supreme Court. He never applied for it nor tendered a bill of exceptions.

He charges in the petition for appeal, fourth, "that he

was also denied the right of setting up by plea in abatement to the indictment and by affidavit to challenge the array of trial jurors on account of the fact that the State jury law has excluded from the jury box the names of all persons of petitioner's race, he being a negro or a person of African descent." There was no such law, and the record shows that he never claimed the right to file such plea or affidavit.

The above are the only matters claimed to involve the application or construction of the Constitution of the United States that were set up in the petition for appeal.

The allegations of the petition in the Circuit Court went more into detail, but each and every of them was explicitly denied by the answer and the record shows that they were wholly unfounded. It contains the testimony of his own counsel, of the judge and clerk of the trial court, and of the Attorney-General who conducted the prosecution. The judge did not inform petitioner's counsel that he was not going to grant a change of venue, nor did he or any other official advise and inform his counsel that if they made an application for a change of venue or a continuance the mob would again attack the jail and succeed in murdering the petitioner. There was no evidence whatever to that effect. The vague statement that "these officials" had caused and inspired an article to be printed in a newspaper assuring the public that the prisoner would surely be tried on the day set, and that there would be no further delay, etc., was wholly unsupported by the proof. On the contrary it appears that the article was prepared and published by one of his own counsel, of his own motion, to allay public feeling. If his counsel saw fit not to take the necessary steps to secure a change of venue, or postponement of the trial from the day they themselves had agreed on, or an exception to the denial of them, as the record shows, this certainly constituted no invasion of Constitutional rights by the State of Tennessee or any official thereof, or anybody else.

That a mob had once attacked the jail with intent to lynch him and been repelled, was true, but he had already been removed to a distant county; that the danger was generally feared of a fresh outbreak of mob violence in case of delay, was doubtless true. But such a condition of affairs, deplorable as it was, will surely not be claimed to constitute a ground for Federal jurisdiction in habeas corpus. It was a local condition with which the State alone had to deal, and if it had any effect on the course of Johnson's trial and this could be the subject of Federal cognizance at all, for which there is no authority whatever in Constitution, law, decision or principle, it could only be in review of the action of the State court of last resort with reference to the matter when properly brought before it.

The record shows it is not true that the court or anybody compelled Johnson to get up from his seat and walk in front of the young lady he was charged with outraging to be examined and scrutinized by her. On the contrary it shows that this very usual request by a juror was complied with by him voluntarily without objection from either him or his counsel.

The allegations with reference to the placing names in the jury box are shown by the record to be wholly untrue.

While it is true that his counsel gave notice that they would file a motion for a new trial, they did not do so because, after careful conference with other lawyers appointed by the court at their request for that purpose, they decided that there were no just grounds for the same. As one of them, Thomas, said to the judge, "I think you have given us a painstaking and a fair and impartial trial." It was unusually so. The prisoner's counsel were advised in advance of the State's evidence, the court recessed to enable them to secure a witness, the trial lasted three days and the jury took from one day until the next in considering their verdict.

This conclusion being presented to the peritioner he submitted to it. He says he did so to avoid being killed by a mob. But surely it will not be contended that this gave the Federal Courts jurisdiction in habeas corpus. It is nowhere suggested that the State authorities vere unwilling to protect him, as they had already done, nor that the power of the State was insufficient to enable them to do so. Even if this were not so the fact would not give the Federal judiciary jurisdiction.

The record shows that counsel who took charge of Johnson's case after he had accepted the decision of those who had conducted his trial to proceed no further never took any steps towards preparing or presenting a bill of exceptions or taking an appeal, although the court remained in session for an entire week after his conviction, and for five consecutive days after said counsel first appeared. The suggestion that the trial judge left the State, as a reason for Johnson's counsel not getting a bill of exceptions and leave to appeal, the record shows to have been wholly frivolous by the testimony of counsel on both sides and that of the new counsel, Paden, himself.

In short, the record shows that this Court was imposed upon with respect to the true nature of this case, and so grossly that it is hard to resist the conclusion that this was purposely done. There was not even the color of a case involving any real question of constitutional right. The conference of counsel, six in number, and of the best the city afforded, unanimously decided that Johnson had had a fair trial; that no error had been committed; that an appeal would therefore be useless except merely to prolong the life of a man found guilty of a most infamous crime, which they did not consider it their duty to attempt, especially in view of the probable result upon public feeling. The subsequent

efforts of other counsel ignorant and reckless of the facts about the trial have put the court unwittingly in a false position and misled the Attorney-General. And we respectfully submit that persistence in the prayer of the Information in view of the plea, supported as it is in all respects by the undisputed facts in the record, would be an appeal to false pride and not to the true dignity which has always ennobled the Supreme Court of the United States.

The people of the South are struggling with a task the like of which was never known before. It is one which nobody but themselves can work out, and they must do it unaided save by friendly sympathy. The provocations for attempts at irregular justice, which are too common in all parts of the country, are more numerous and frequent there where apprehension stands at every man's door to quicken his indignation at outrages committed upon the families of his neighbors.

The Attorney-General in his testimony said: "I feel like the law's delay already in respect of all cases of this kind had engendered whatever mob spirit existed throughout the country on account of offenses like this, and if we could have speedy trials rather than delay them it would have a good effect on the public with reference to allaying in the future any such mob spirit as generally existed in cases of this kind."

That this is true there can be no doubt. There may be cases where haste overleaps the precautions with which the administration of justice must always be guarded, but the courts of the States do not lack the power or the will to correct such errors. When to mere error is added the sacrifice of rights secured by the Federal Constitution this court has always been and will always be prompt with its ample power of redress which is limited only by precautions against premature or needless interference with State tribun-

als to which the Constitution is as sacred as to itself. Whitten vs. Tomlinson, supra, at p. 245.

The case here presented involved neither a denial of justice, whether by the laws of Tennessee or by the mode in which they were administered, nor the invasion of a right secured by the Federal Constitution. It was therefore not a case of which the Circuit Court or this Court was authorized to take cognizance. The Circuit Court, learning the nature of the case, dismissed the petition. This Court, however, undertook to entertain an appeal under misapprehension caused by a reckless misrepresentation of its character. If these defendants did what they are charged with doing they are each and all foresworn officers of the State of Tennessee and criminals under its laws besides. It would be a reflection on the dignity of that old and honored Commonwealth to assume that they will go unpunished. And we submit, with all respect, that if the Court shall find that the case was in fact one in which under the law an appeal did not lie, its dignity will be better sustained by correcting its allowance of one than by making it the basis of further action, and that of a purely criminal nature which can subserve no remedial purpose whatever.

Respectfully submitted,

JUDSON HARMON,

For J. F. Shipp, Sheriff, et al.

CLIFT & COOKE,

ROBERT PRITCHARD,

Of Counsel.

November, 1906.

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THE UNITED STATES OF AMERICA, complainants.
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JOHN F. SHIPP ET ALS., DEFENDANTS.

No. 5 Orig
O. T. 1907

BRIEF

Of Attorneys for Nicholas Nolan, Claude Powell, Charles Powell, Bart Justice, John Jones, Henry Padgett, William Mayes, John Varnell and Alfred Handman.

In the Supreme Court of the United States.

October Term, 1906.

May it Please the Honorable Court:

Inasmuch as the charges against these defendants are the same, and as their defenses are identical in substance, we have chosen to present a joint brief for all of them.

The allegation of the Information against these respondents is found in the 5th paragraph and is as folows:

"That thereafter, to-wit: at about the hour of 9 o'clock on the evening of the said 19th day of March, 1906, at the city of Chattanooga, in the said county and state, the above named defendants, John F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frawley, George Brown, Jeremiah Gibson, Marion Perkins, Joseph Clark, "Nick" Nolan, (whose true first name is to complainants unknown) "Sheenie" Warner (whose true first name is to complainants unknown), Luther Williams, Paul Pool, William Marquette, William Beeler, Claude Powell, Charles J. Powell, "Bart" Justice, (whose true first name is to complainants unknown), John Jones, A. J. Cartwright, Henry Padgett, William May, Frank Ward, John Varnell and Alfred Hammond, and each of them and a large number of other persons whose names are to complainants unknown, did then and there willfully, unlawfully, and wrongfully combine, conspire, confederate, and agree together to break and enter the said county jail of Hamilton county for the purpose of taking therefrom the person of the said Ed Johnson to lynch and murder him, the said Ed Johnson, with the intent then and there had and entertained by the said defendants, and each of them, to show their contempt and disregard for the order of this honorable court made, entered, issued and published, as aforesaid, and for the purpose of preventing this honorable court from hearing the appeal of the

said Ed Johnson, allowed by this court, as aforesaid, and for the purpose of preventing the said Ed Johnson from exercising and enjoying a right secured to him by the Constitution and laws of the United States; that in the prosecution and furtherance of said unlawful conspiracy, made and entered into as aforesaid, and in order to show their contempt and disregard for the said order of this honorable court, and in order to prevent this court from hearing said appeal, said defendants and each of them did then and there do the things and commit the acts more particularly described, as follows, to-wit:

"That between the hours of 9 and 12 o'clock on the evening of the said 19th day of March, 1906, at the city of Chattanooga, in the county and state aforesaid, a large number of persons, including the above named defendants, with the exception of the said John F. Shipp, the sheriff of said county, and the said Jeremiah Gibson, deputy sheriff of said county, assembled in the vicinity of said county jail, and thereupon said mob unlawfully and wrongfully entered said jail and with force and arms broke open the cell in which the said Ed Johnson was then and there confined as a prisoner, and with force and violence and against the will of him, the said Ed Johnson, took him, the said Ed Johnson, from said jail to a point a short distance therefrom and hanged him, the said Ed Johnson, by the neck until he was dead; that at the time said mob entered said jail, as aforesaid, the only person in charge thereof was the said deputy sheriff, Jeremiah Gibson; that while the mob was in possession of said jail the said sheriff, John F. Shipp, arrived at said jail but made no effort to prevent said mob or any of the members thereof from taking the said Ed Johnson from said jail; that the said John F. Shipp and the said Jeremiah Gibson were in truth and in fact in sympathy with said mob, and while pretending to perform their duty as officials of said county and state in affording protection to the said Ed Johnson, who was then and there in their unlawful custody and control, the said John F. Shipp and the said Jeremiah Gibson and each of them did in truth and in fact

aid and abet said mob and the members thereof in the prosecution and performance of their unlawful act in lynching and murdering the said Ed Johnson, as aforesaid; that during all this time the above named defendants and each of them, and the said John F. Shipp and the said Jeremiah Gibson and each of them then and there well knew that the Supreme Court of the United States had made, entered, issued, and published the order in the manner hereinbefore set forth; that all of said acts were then and there committed by said defendants and each of them, and the other members of said mob, whose names are to complainants unknown, with the intent then and there had and entered into by them and by each of them to show their contempt and utter disregard for the order of this honorable court made and entered into as aforesaid, and in order to prevent this honorable court from hearing the appeal of the said Ed Johnson, which appeal had been perfected and allowed, as aforesaid."

Each of the defendants has filed a separate answer in which he purges himself of the contempt alleged against him by direct and positive denial of every fact alleged against him in the Information of the Attorney General. Each of them denies that he violated the order of this honorable court, or that he did any act in connection with the lynching of Ed Johnson by the mob of the 19th of March, 1906, which was in contempt of the order of this honorable court, or intended to deprive it of hearing the appeal of said Ed Johnson, or that he counselled or advised the act of the mob in advance, or approved it after it was done. We quote the answer of the defendant Alfred Handman, which substantially is the same as the answers of all the defendants:

The United States of America, Complainants,

vs.

John F. Shipp and others, Defendants.

Answer of Alfred Handman to the Information of Mr. Attorney General William H. Moody, filed in the above styled

cause, and to the rule to show cause why he should not be punished as and for a contempt of this honorable court, issued May 28, 1906.

By way of answer to the information filed by the Attorney General and the rule granted by the honorable court this defendant shows and avers as follows:

He denies that he had any connection with or had anything to do with the mob which attacked the jail of Hamilton County, Tennessee, on the evening and night of the 19th day of March, 1906, when Ed Johnson was taken from said jail and hanged. This defendant had no knowledge or information whatever by rumor or otherwise that a mob was to be formed or was forming to lynch and murder said Ed Johnson.

He did not at any time combine, conspire, confederate or agree with the persons named in said Information or any or either of them, or with any other person or persons to break and enter the jail of Hamilton County for the purpose of taking therefrom the person of Ed Johnson to lynch and murder him. He did not participate with the mob that broke the jail, or with the mob which lynched and murdered said Ed Johnson. He did not know beforehand that a mob was to be formed to lynch said Ed Johnson, and he did not in any way aid, abet, counsel or advise the lynching of said Johnson, and did not know anything about the formation of the mob or its work until after the affair was over, and did not approve the action of the mob in lynching and murdering the said Ed Johnson.

Defendant was informed after Johnson was hanged, that the mob attacked the jail at or about the hour of 9 o'clock P. M. March 19, 1906. At that time defendant was at the saloon of Ransom & Co., on Market street, in the city of Chattanooga, where he had gone about 8 o'clock P. M. to meet some friends. He met among others Messrs. Wm. Hodgson, Richard Pooler and John Kean. By an ordinance of the City of Chattanooga all saloons are required to close at the hour of ten o'clock. He remained at said saloon until the closing

thereof at ten o'clock P. M. After leaving said saloon defendant went immediately to Fire Hall No. 1, on Carter street, in said City of Chattanooga, and there met the night watchman, Mr. Henry Gunther, who told him of the lynching of Ed Johnson. He left the Fire Hall about 10:30 o'clock P. M. and went to his bed at the home of Mrs. Kelly O'Rear, on Gillespie street.

This defendant denies that he ever at any time did any act to show contempt and disregard for the order of this honorable court or to prevent this court from hearing the appeal of the said Ed Johnson. He has always entertained the very highest respect for this honorable court.

And now having fully answered the information and rule so far as they affect him, he prays to be hence discharged and as in duty bound he will ever pray.

ALFRED HANDMAN.

LEWIS SHEPHERD,
FLEMING & SHEPHERD,
Attorneys for Defendant.

State of Tennessee, Hamilton County.

Personally appeared Alfred Handman and made oath that the facts stated in the foregoing answer are true to the best of his knowledge, information and belief.

ALFRED HANDMAN.

Subscribed and sworn to before me this Oct. 8, 1906.

WILLIAM C. SHEPHERD,
Notary Public.

This answer and the others are duly sworn to by the defendants, and we respectfully insist that they are full and frank answers to the charges made in the Information. We do not see how answers could be framed which would more completely meet and deny the charges and specifications preferred against the defendants.

Upon the coming in of these answers, we entered a motion severally for each of the respondents to discharge the rule nisi against him.

I.

SHOULD THE DEFENDANTS BE DISCHARGED UPON THE COMING IN OF THEIR SWORN ANSWERS PURGING THEMSELVES OF CONTEMPT?

Proceedings in contempt are of two classes, namely, (1) those instituted solely for the purpose of vindicating the dignity and preserving the power of the court. These are criminal and punitive in their nature and are usually instituted by the court in the interest of the general public and not of any particular individual or suitor. (2) Those instituted by private individuals for the purpose mainly if not wholly of protecting or enforcing private rights and in which the public have no special interest. These are remedial or civil in their nature rather than criminal or punitive.

The proceeding in this case falls within the first class of contempts mentioned. The rule at common law was that a person charged with contempt of a court of law was made to answer the contempt on oath, and if by his oath he cleared himself of the contempt he was discharged. No testimony was taken by the court to rebut his own, but should he swear falsely, he was subsequently prosecuted for perjury. This is still the rule except in cases affecting private property and private rights. It does not make so much difference whether the contempt proceeding is in a court of law or a court of equity. The logical distinction between contempts in this regard relates to the nature of the particular contempt rather than to the court in which it occurred.

Thompson v. Pa. Ry. 48 N. J. Equity 105.

Manifestly, the contempt charged in this case belongs to

the class known as criminal or constructive contempts in which the answer of the contennor is conclusive.

Rex v. Vaughan, 2 Doug. 516;
Rex v. Sims, 12 Mod. 511;
U. S. v. Dodge, 2 Gall (U. S.) 313;
In Re May, 1 Fed. Rep. 737;
Haskett v. State, 51 Ind. 176;
Burke v. State, 47 Ind. 528;
State vs. Earle, 41 Ind. 464;
People v. Few, 2 Johns. 290;
Matter of Walker, 82 N. C. 95;
Matter of Moore, 63 N. C. 397;
Thomas v. Cummings, 1 Yates Pa. 40;
Underwood's case, 2 Hump. Tenn. 46.

The case In Re May, 1 Fed. Rep. 737, the opinion in which was delivered by Mr. Justice Brown while he was a Circuit Judge, seems to us to contain a lucid and accurate statement of the law bearing on this question. In that case there was a rule nisi against a juror setting forth that the defendant had gone in the night time to the house of Markus Burnstine, one of the defendants to a suit then being tried before the jury, for the purpose of corruptly conferring with Burnstine concerning the case on trial, and concerning the verdict to be rendered therein, and that he talked with Burnstine and allowed Burnstine to talk with him concerning the facts in evidence in the case, and also corruptly negotiated with Burnstine as to the verdict he should render in the case, and that therefore defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the ends of justice.

The defendant answered, and gave in his answer a lengthy history of his transactions with one of the litigants which presented on its face an incredible and unreasonable story. It was a fishy story on the face of it. Judge Brown uses the following language in deciding the case:

"It is a cardinal rule in proceedings for criminal contempt

that the answer of the defendant cannot be traversed and must be taken as true. If false, the government is remitted to a prosecution for perjury." Citing 4 Black. Com. 281. In the matter of Pitman, 1 Curt. 186; U. S. v. Dodge, 2 Gall. 313; etc.

"But the answer must be credible and consistent with itself, and if the respondent states facts which are inconsistent with his avowed purpose and intention, the court will be at liberty to draw its own inferences from the fact stated. For instance, if the respondent in this case had stated that in his interview with Burnstine he had asked and received of him $1,000.00, and had kept the money in his pocket until after the jury were discharged; and had further stated that he did this for the purpose of delivering the money to the District Attorney, and prosecuting Brunstine for bribery, it would scarcely be contended that the court would be bound to draw the same inference from his conduct. So then, it is, after all, a question in every case whether the facts stated are consistent with an honest intent."

The case of Haskett vs. The State, 51 Ind., 177, was a proceeding of contempt agains a man charged with having induced a witness to hide and conceal herself to avoid service of a subpoena to testify on her; he answered admitting that he had accompanied the witness when she went away from the court where the action was pending; that she was his daughter and told him that she meant to abandon the prosecution; that he had no knowledge that a subpoena had been issued for her, etc., etc.

Upon this answer the defendant moved to be discharged, which motion was overruled. The court reversing the judgment in that case said:

"It has been held in several cases in this court that if the defendant in such case deny under oath the facts constituting the alleged contempt, he should be discharged, leaving him, if he has sworn falsely, to be prosecuted for perjury."

And again:

"We believe it is the policy of the law not to extend the proceeding for constructive contempt to cases not coming within established rules, and we are, therefore, the more willing to hold that the answer of the appellant was sufficient to purge him of the alleged contempt. We conclude that the court should have discharged the appellant from the attachment upon the showing made by him. We may remark in conclusion that it was probably wrong for the court, after adjudging the appellant's answer insufficient, and he had declined to answer further on to make an issue for him and proceed to try the same. If the answer did not purge the alleged attempt, there was probably nothing to be done, but to assess such punishment as the circumstances of the case made proper. Whether the defendant does or does not purge himself of the alleged contempt, there should not probably be any trial."

In Burk vs. The State, 47 Ind. 528, the rule is thus stated:

"Where a person charged with a constructive contempt in procuring a witness to absent himself appears, and in answer to a rule, makes a sworn statement that the matters in the affidavit are not true, and alleges the state of facts consistent with his innocence, and that there was no intention to interfere with the process of the court, he should be discharged; and it is error for the court to proceed and hear evidence of the truth of the original affidavit and the falsity of the answer.".

In State v. Earle, 41 Ind. 465, the learned judge Osborn remarks:

"We have examined the authorities and are satisfied that in all cases of proceedings for alleged constructive contempt, except perhaps when they are to enforce a civil remedy, if the party charged fully answers all the charges against him, he should be discharged as to the attachment and that the court cannot after that hear evidence to impeach or contradict him."

To the same effect is People vs. Pew, and others, 2 Johns. 290.

In Walker's case in 82 N. C. page 95, it is stated by the court that where the answer to a rule to show cause why one should not be attached for contempt negatives under oath any intentional disrespect to the court or purpose to obstruct its process the rule should be discharged.

The case In Re B. F. Moore, et als, 63 N. C. 397 is in many respects a very peculiar one. Certain lawyers had united in signing and publishing a paper which was headed:

"A SOLEMN PROTEST OF THE BAR OF NORTH CAROLINA AGAINST JUDICIAL INTERFERENCE IN POLITICAL AFFAIRS," and in which, among other offensive things, they said: "But never before have we seen the judges of the Supreme Court singly or en masse moved from that becoming propriety so indispensable to secure the respect of the people, and throwing aside the ermine, rush into a mad contest of politics under the excitement of drums and flags. From the unerring lessons of the past, we are assured that the judge who openly and publicly displays his political party zeal, renders himself unfit to hold the balance of justice and that whenever an occasion may offer to serve his fellow partisans he will yield to the temptation and the 'wavering balance' will shake."

Respondents answered, admitting the signing of the paper, but explaining that the paper was conceived and prepared during a recent political canvass for the presidency, and that its publication was deferred until after the close of the canvass to avoid its having the appearance of a partisan document. They admitted that their purpose was to express their disapprobation of the conduct of individuals occupying high judicial stations. Yet, as an act of justice to themselves against the charge made in the rule, they disavowed in signing and publishing the paper any intention of committing a contempt of the Supreme Court, or of impairing the respect due to its authority, but on the con-

trary, they avowed that their motive was to preserve the purity which had ever distinguished the administration of justice by the courts of their state. The court disposed of the case as follows:

"The learned counsel then fall back on the ground of a distinction between the indictment for a libel and a rule nisi to show cause, and assumed, as a matter of law, that in this case the respondent having, on oath, disavowed any intention of committing a contempt of the court, or of impairing the respect due to its authority, so as to meet the words of the rule, it must be discharged. The authorities cited by the learned counsel are conclusive. The law is well settled in this class of cases, where the intention to injure constitutes the gravamen. The rule rests in sound reason. In this proceeding, as the court is judge in its own case in the first instance, where the case is made out in the judgment of the court, the party in the last instance is allowed to try himself. His intention is locked within his own breast and is known to himself alone, and he is permitted to purge himself by his own avowal. He cannot be convicted, if he is innocent, as he may be by false evidence before a jury. For the court does not try him, he tries himself. Chief Justice Wilmot's opinion 257-8, referred on the trial of Judge Peck 507. If the party after the court decides against him, declines to try himself, it must be because he knows himself to be guilty."

Now, if it be true, as held in these North Carolina cases that contemors may admit that they did the acts complained of, and yet upon their showing on oath that they had no intention to set at naught or disregard the orders of the court, that they must be discharged without more, is it not, we respectfully inquire, afortori, a sound statement of the law that in a contempt involving criminal acts, the answer of the defendants denying the commission of the acts charged against them are conclusive and must result in their discharge?

So we insist that the motion to discharge the defendants be-

cause they have purged themselves of the contempt by their answers should be sustained.

Cyc. vol. 9, p. 44, Oster vs. People, 192 Ill., 473. Exparte Debs, 64 Fed. 724. Exparte Savin 131 U. S. 267.

II.

IF THIS MOTION BE NOT GRANTED THEN WHAT IS TO BE THE COURSE OF PROCEDURE?

It may be put down to the credit of the people of the United States that cases of original cognizance, where this great tribunal has been called upon to issue process of contempt, are exceedingly rare.

The people have too profound a respect—too great a veneration for this, the highest court in the land, to knowingly or intentionally violate its orders, or to impede it in the administration of justice. Some cases of contempt (not a great many), which originated in the inferior courts have found their way to this court. One of the most notable cases of this kind is that of Hovey v. Elliott, 167 U. S. 409 in which Mr. Justice White gave a very able and exhaustive "judicial history of the law concerning contempt of court in England and in this country."

The point which the honorable court was illustrating was, that in a contempt case, the defendant had the same right to demand that he be heard in his defense as he would have in a criminal case. The court says, page 443:

"In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt, which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtain-

ing jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

In the case of McVeigh vs. U. S., 11 Wall. 259, where it was sought to deny the right of McVeigh to be heard in opposition to the confiscation of his property by the United States because he was engaged in rebellion against the United States, Mr. Justice Swayne observes:

"In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confirmed to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our civilization. We cannot hesitate or doubt on this subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

In the case of Windsor vs. McVeigh, 93 U. S. page 277, which was ejectment for the recovery of land which had

been confiscated, Mr. Justice Field delivering the opinion, the court says:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim, or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard, and when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case, of the right to appear, is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court or the established practice in

such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether."

Of course, it is well understood that in the face of the answer of these respondents, the court will not condemn them without a hearing. The question is, if their answers be not accepted as conclusive and the facts must be inquired into further, how is that to be done so as to preserve the rights of the defendants to be heard? It cannot be conceived that this honorable court would turn itself into a trial court and jury to hear witnesses examined and cross-examined, and arguments of lawyers upon the question of the guilt or innocence of these men. It may be in accordance with good practice to refer the question to a commisioner to take evidence and report to the court.

This brings us back to the point of again insisting that the safe and proper way to dispose of this question is to adhere to the course of procedure of the ancient common law, which is to discharge the defendants on their answers purging themselves for contempt.

Respectfully submitted,

LEWIS SHEPHERD,
MARTIN A. FLEMING,
T. P. SHEPHERD.
Attorneys for Defendants.